

No. 89-1666

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Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1989

J.M. SMITH CORPORATION, D/B/A
SMITH DATA PROCESSING,

Petitioner,

v.

pci CORP.; HILL PHARMACY GROUP, INC.;
KENNETH A. HILL; W.K. ENTERPRISES, INC.;
WES KING; RICHIE S. LYNN, D/B/A RICH-2
PHARMACY CONSULTING SERVICES; PROFESSIONAL
SYSTEMS S.E., INC.; A. RODNEY ASHBAUGH;
DR. T.C. SMITH COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENTS'
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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May 21, 1990

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that a party licensed to reproduce a copyrighted work has the right to prepare and publish a derivative work absent authorization to do so?

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REPLY

The Issue Is Stated Correctly

The statement of the issue in the Petition is precisely correct. Respondents' contentions to the contrary constitute a diversion from their failure to address the issue.

The stated issue derives directly from the holding of the Trial Judge, and comparing the two substantiates the correctness of this issue as basis for the Petition.

The Trial Judge, upheld by the Appellate Court, stated:

. . . I do feel as a matter of law the settlement agreement *did not prohibit* the right to make additional derivative works. . . .

App. D at 27 (emphasis added).

The stated issue is:

Did the Court of Appeals err in holding that a party licensed to reproduce a copyrighted work has the right to prepare and publish a derivative work absent authorization to do so?

Petition at i.

Respondents Fail To Address The Issue

Respondents fail to meet this issue in any way.

Rather than address the issue of derivative works, Respondents accuse Smith Data Processing* of not raising a requisite question of fact regarding the lower Courts' "failure to find that pCI was a derivative word." Respondents' Brief at 5. *But both lower Courts did make this critical finding:*

*There are no parent or subsidiary companies of Petitioner, J.M. Smith Corporation, pursuant to Supreme Court Rule 29.1.

After implying a license to reproduce the copyrighted work (App. C at 10; Petition at 6), the District Court stated:

After carefully considering the excellent memoranda and supporting authorities submitted by both sides, hearing over four hours of oral argument on July 15, 1987, and conducting a telephonic conference call on July 27, 1987, *the court has concluded that the misappropriation which plaintiff claims in this action is, in part, the same misappropriation alleged by the plaintiff prior to the settlement agreement.*

App. C at 9 (emphasis added).

The Appellate Court stated:

On appeal, appellant contends that the settlement agreement reached between the parties does not extend to derivative works of the program that existed at the time of settlement. *This issue was properly resolved in the summary judgment finding that the misappropriation which plaintiff claimed was, in part, the same misappropriation alleged by the plaintiff prior to the settlement agreement.*

App. A at 7 (emphasis added).

These findings, that Settlement-pcI was licensed and that Enhanced-pcI is a derivative work of Petitioner's copyrighted underlying work, are the basis for the question of law advanced in the Petition.

In addition, Respondents choose to divert attention to a holding on the extent to which the pre-litigation Settlement Agreement bars existing causes of action. Respondents' Brief at 5.

There is no dispute that the Settlement Agreement barred all existing causes of action. But the derivative work, Enhanced-pcI, was made after settlement, creating a cause of action that could not have been precluded by the Settlement Agreement.

There Was No Release As To Post-Settlement Derivative Works

Further, to release a claim does not concede the merits of that claim. In the Settlement Agreement, Petitioner released a cause of action for copyright infringement. There was *no stipulation of fact* as to whether Petitioner's underlying work was contained in Settlement-pcI, as Respondents contend (Respondents' Brief at 4). This issue has never been resolved and *need not be* to properly resolve the only question before this Court, i.e., is Enhanced-pcI an unauthorized derivative work of the copyrighted underlying work? This question has been answered in the affirmative by both Courts below.

CONCLUSION

The question before the Court is proper and meritorious, and is in compliance with the lower Courts' findings. Full consideration of the derivative work issue is respectfully requested and emphatically urged.

Respectfully submitted,

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